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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD DELAROSA,

Defendant and Appellant.

H022614

(Santa Clara County
Super.Ct.No. C9951072)

I. Statement of the Case

Defendant Ronald Delarosa appeals from a judgment entered after a jury convicted him of rape, lewd conduct with a child, and assault with intent to commit oral copulation. On appeal, he claims the court erred in giving CALJIC No. 10.60. He claims the court unfairly prevented defense counsel from making fair comment on the police and prosecution's failure to investigate this case. Last, he claims the prosecutor was guilty of misconduct during closing argument.

We affirm the judgment.

II. Facts

The victim, who was 11 at the time of the offenses, testified that in August 1998, she was staying with her father, who is defendant's brother-in-law. Defendant, who was around 17 years old at the time, came over one night to babysit her and her brother. Late at night, the victim was on her father's bed and started to doze off. Defendant, who was

on a mat on the floor next to the bed, called her name and pointed to the floor. When she looked over the bed, he pulled her to the floor, held her by the throat with one hand, and pulled her shorts down with the other hand. He then pried her legs apart with his leg and penetrated her vagina with his penis. As this was happening, the victim's father drove up to the residence. Defendant told the victim to pull up her shorts, get back into bed, and not tell anyone or else he would "get" her. She testified that she did not cry out or report what had happened because she was afraid. She further testified that the next day she had pain in her genital area.

The victim testified that during the Christmas-New Year holidays in 1998, she again was visiting her father. One night, when her father was gone, defendant came into the bedroom she was sharing with her stepsister. Defendant's shorts were pulled down, and his penis was erect. He came over to the victim, grabbed her by the hair, and pushed her face toward his crotch, causing her cheek to brush his penis. She freed herself, pushed him away, and threatened to scream if he did not leave her. He complied.

The victim did not immediately report either incident, but she disclosed them to her teacher in May 1999. That day, her teacher observed the victim acting "spacey." Although normally a leader in class, the victim kept apart from others working on a school project and seemed sad and tired. The victim said she saw an expression on a classmate's face that reminded her of "[a] bad event that happened." The teacher had the victim stay after class. At that time, the victim reported that something was bothering her that was "too bad to tell" and would make people angry. The teacher had her type on a computer, and the victim wrote a short message to the effect that something had happened at Christmas time and involved a sexual assault and her stepmother's brother. The victim then erased the message, started to cry, and asked the teacher not to tell anyone. However, the teacher took her to the principal's office. The victim's mother came to school and found the victim hunched over and crying. A police officer also arrived. The victim told her mother what had happened, and her mother told the police.

The victim described two incidents, one involving rape by defendant. She said the assault and rape occurred around Christmas and that the other incident occurred in February. The officer thought the victim seemed clear on the substance of what happened but less so concerning when it happened.

The Defense

Defendant admitted being in the bedroom with the victim on that August evening in 1998. However, he said he fell asleep and remained so until the victim's father came home and woke him up. He denied even touching the victim.

Defendant testified that around New Years Eve in 1998, he and others picked up the victim and brought her to her father's house, where there was a party. He then left and stayed at his girlfriend's house until around 3:00 a.m. When he returned to the victim's father's house, he did not enter the room where the victim was staying and denied grabbing her or touching her with his penis. He could not explain what he did to make the victim so mad at him.

III. CALJIC No. 10.60

Defendant contends the trial court erred in giving CALJIC No. 10.60. As given, the instruction informed the jury that "[i]t is not essential to a conviction of a charge of rape or lewd and lascivious act on a child under 14, or assault with intent to commit oral copulation by force or threats that the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated [*sic*] by other evidence."

Defendant claims that a reasonable juror would understand the instruction to mean that the prosecution's failure to produce evidence to corroborate the victim's testimony is not a relevant consideration in determining the victim's credibility. Defendant asserts, however, that the lack of corroboration is a relevant consideration. Thus, the instruction, which eliminated it, "unconstitutionally relieve[d] the prosecution of its burden of proof, in violation of due process." We disagree.

Defendant acknowledges that in *People v. Gammage* (1992) 2 Cal.4th 693, the California Supreme Court stated that both CALJIC No. 2.27¹ and No. 10.60, “considered separately, correctly state the law. ‘In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.’ [Citation.]” (*People v. Gammage, supra*, 2 Cal.4th at p. 700.) The court rejected the defendant’s claim that CALJIC No. 10.60 creates a preferential credibility standard for the complaining witness that, in effect, dilutes the prosecution’s burden to prove guilt beyond a reasonable doubt. (*People v. Gammage, supra*, 2 Cal.4th at pp. 700-701; see *People v. Akey* (1912) 163 Cal. 54, 56 [“There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury”].) The court stated that despite some overlap, “CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes.” (*People v. Gammage, supra*, 2 Cal.4th at pp. 700-701, original italics.) Thus, “one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other.” (*Id.* at p. 701.) Thus, “[t]he instructions in combination are no less correct, and no less fair to both sides, than either is individually.” (*Ibid.*)

The court further explained that “[t]he jury is instructed that the prosecution must prove its case beyond a reasonable doubt. This places a heavy burden of persuasion on a

¹ As given by the court in this case, CALJIC No. 2.27 states, “You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.”

complaining witness whose testimony is uncorroborated. CALJIC No. 10.60 does not affect this instruction but . . . when all the instructions are given, ‘a balance is struck which protects the rights of both the defendant and the complaining witness.’ ” (*People v. Gammage*, *supra*, 2 Cal.4th at p. 701.)

Defendant “questions the reasoning of the Supreme Court in *Gammage*” and argues that it does not control because the Supreme Court did not address the argument raised here: that by directing the jury to disregard the fact that the victim’s testimony is uncorroborated, CALJIC No. 10.60 *relieves* the prosecution’s burden of proof, *shifts* the burden to defendant to prove innocence. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

First, we reject defendant’s view of how a reasonable juror would understand the instruction. In determining the impact of an instruction, we do not consider it in isolation; rather, we view it along with all the instructions and ask whether there is a reasonable likelihood that the jurors would misunderstand the challenged language in a way that was prejudicial. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Price* (1991) 1 Cal.4th 324, 446; *People v. Garrison* (1989) 47 Cal.3d 746, 780.) Here, the court instructed the jurors they were the sole judges of both the believability of the witnesses and the weight to be given their testimony. They were told that in determining credibility, they could consider “anything” that has a tendency to prove or disprove the truthfulness of the testimony of the witnesses, including the existence or nonexistence of any fact testified to by the witness. In our view, it is not reasonably likely that jurors would understand the simple and explicit message of CALJIC No. 10.60—i.e., that corroboration of the victim is not *essential*—to mean that the lack of corroboration is irrelevant and should be ignored in evaluating both the credibility and weight of the victim’s testimony or in determining whether the prosecution has satisfied its burden of proof.

Second, we note that a lack of corroboration is not evidence. Nor does it directly contradict the victim's testimony or generally impeach her credibility. Rather, the lack of corroboration is merely a basis to argue that victim should not be believed. Thus, even assuming that CALJIC No. 10.60 is susceptible of defendant's interpretation, we reject his conclusion that such it somehow *relieved* or *lessened* the prosecution's burden of proof or shifted the burden to defendant. Rather, the jury was properly instructed on the presumption of innocence, the elements of the charge offenses, and the prosecution's burden to prove each element beyond a reasonable doubt. The jury was also correctly instructed that neither party was required to present all of the evidence that might support their respective positions. (See CALJIC No. 2.11.)

Defendant's reliance on *Sandstrom v. Montana* (1979) 442 U.S. 510, *Francis v. Franklin* (1985) 471 U.S. 307, *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901; and *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959 is misplaced. In *Sandstrom*, the United States Supreme Court held that a defendant was denied due process when a jury instruction indicated he was presumed to have acted with malice. In *Francis*, the court, citing *Sandstrom*, held that an instruction that said the defendant was presumed to act with sound mind violates the due process clause of the Fourteenth Amendment. In *Patterson*, the court held that an instruction directing the jury to presume the defendant was sane unconstitutionally shifted the burden of proof. In *Houston*, the court held that an instruction concerning the lying-in-wait special circumstance—i.e., that the killing must follow immediately after the lying in wait—neither relieved the government of its burden to prove that the killing immediately followed the lying in weight nor shifted the burden to defendant to prove a gap between the lying in wait and killing. Although these cases generally condemn instructions that lessen the burden of proof on a factual issue or element of the offense, they do not suggest that CALJIC No. 10.60 does so.

Finally, we note that although the *Gammage* court may not have ruled on the precise argument raised by defendant, its analysis and approval of the instruction,

provides strong and persuasive guidance here, especially its conclusion that the instruction does not dilute the prosecution's burden of proof.

In sum, we conclude that CALJIC No. 10.60 was properly given in this case.

IV. Failure to Investigate

Defendant contends that during defense counsel's closing argument, the trial court erred in sustaining the prosecutor's objection to defense counsel's assertion that "nothing was ever done to develop evidence" to find out if the events as described by the victim really happened. Defendant argues that counsel's assertion was "fair comment" on the fact that the police did not visit the houses where the events allegedly took place, seize the mat next to the bed, perform a DNA analysis on body fluids, or have a medical examination of the victim. Nor did the prosecution present an expert on Child Abuse Accommodation Syndrome to explain why the victim did not complain sooner.

The record reveals that the prosecutor objected to defense counsel's assertion—that the *nothing* was done—because it misstated the evidence. The court sustained the objection, telling jurors that "you are the recollectors of the evidence" Apart from this, defense counsel was permitted to point out the lack of evidence to corroborate the victim's testimony and the limitations on the investigation. Under the circumstances, we find no error and further find that any alleged error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

V. Prosecutorial Misconduct

Defendant contends the prosecutor was guilty of misconduct during closing argument.

First, defendant faults the prosecutor for stating, "If I've said or done anything that you found wrong, inappropriate . . . tell me afterwards. Hold it against me, but don't hold it against [the victim]. If you don't like me, that's fine." Defendant argues that counsel's argument "was a blatant appeal to the sympathy and passion of the jury. Since the prosecutor attempted to personalize the prosecution, making it appear that the jury

must act to vindicate [the victim] as an individual, and not simply to protect the public interest, [defendant] has been denied a fair trial.”

Second, defendant faults the prosecutor for arguing, “Your decision, again, is based upon the evidence. The evidence is what comes from that witness stand. It doesn’t come from this chair. It doesn’t come from that chair (indicating). It comes from that chair and exhibits that we move in. That is the evidence. That’s what you base your decision on. You don’t base it upon sympathy. If you think, ‘Oh, my. [The victim’s] so young. She was so traumatized. We need to consider that.’ Don’t consider that in reaching your decision. You can consider that in judging her credibility. But if you feel sorry for her that isn’t relevant. Her manner and demeanor of how she testified is relevant as to her credibility. . . .” Defendant argues that despite the disclaimers, the prosecutor implicitly and improperly urged the jury to consider the victim’s trauma in reaching its verdict.

It is settled that claims of alleged prosecutor misconduct are waived on appeal if the defendant did not object below, unless the prejudice from the misconduct could not have been cured by a timely objection and admonition. (*People v. Staten* (2000) 24 Cal.4th 434, 465; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Vargas* (2001) 91 Cal.App.4th 506, 568.)

Here, defense counsel did not object to the instances of alleged misconduct, and we find none of them incurably prejudicial. Thus, defendant waived these claims.

Moreover, during his closing statement, defense counsel expressly countered the first instance of alleged misconduct, quoting it and stressing that the victim is not a party to the prosecution and that the case involves the charges by the People against the defendant. In addition, the court instructed the jury that it was not to render its decision on the basis of passion or prejudice. Under the circumstances, we would not find the alleged harm from the prosecutor’s comments sufficient to compel reversal. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

VI. Disposition

The judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.